



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 9, 2004

Ms. Michele N. Austin
Assistant City Attorney
City of Houston
P.O. Box 1562
Houston, Texas 77251-1562

OR2004-5643

Dear Ms. Austin:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 204776.

The Houston Police Department (the "department") received a request for information relating to a named individual. You claim that the requested information is excepted from disclosure under sections 552.103, 552.108, and 552.130 of the Government Code. We have considered the exceptions you claim and have reviewed the information you submitted.

We first note that the submitted information includes records that were obtained under grand jury subpoenas. This office has concluded that a grand jury is not a governmental body that is subject to the Public Information Act (the "Act"), chapter 552 of Government Code, so that records that are within the actual or constructive possession of a grand jury are not subject to disclosure under the Act. *See* Gov't Code § 552.003(1)(B) (definition of governmental body does not include the judiciary); Open Records Decision No. 513 at 3 (1988) (information held by grand jury, which is extension of judiciary for purposes of Act, is not itself subject to Act). When an individual or an entity acts at the direction and as an agent of the grand jury, information prepared or collected by the agent is within the grand jury's constructive possession and is not subject to the Act. *See* Open Records Decision No. 513 at 3. Information that is not so held or maintained is subject to the Act and may be withheld from disclosure only if a specific exception to disclosure is shown to be applicable. *Id.* Thus, to the extent that the department has custody of the submitted information as an agent of the grand jury, all such information is in the grand jury's constructive possession and is therefore not subject to disclosure under the Act. *Id.* at 4. To the extent that the department does not have custody of the information as agent of the grand jury, we address its public availability under the Act.

We next note that the submitted information includes an arrest warrant. The 78th Legislature amended article 15.26 of the Code of Criminal Procedure to add language providing:

The arrest warrant, and any affidavit presented to the magistrate in support of the issuance of the warrant, *is public information*, and beginning immediately when the warrant is executed the magistrate's clerk shall make a copy of the warrant and the affidavit available for public inspection in the clerk's office during normal business hours. A person may request the clerk to provide copies of the warrant and affidavit on payment of the cost of providing the copies.

Crim. Proc. Code art. 15.26 (emphasis added). Thus, the submitted arrest warrant is made public and must be released under article 15.26 of the Code of Criminal Procedure. As a general rule, the exceptions to disclosure found in the Act do not apply to information that is made public by other statutes. *See* Open Records Decision Nos. 623 at 3 (1994), 525 at 3 (1989). Therefore, the arrest warrant that we have marked must be released in accordance with article 15.26 of the Code of Criminal Procedure.

The submitted information also includes search warrant affidavits. These documents are subject to article 18.01 of the Code of Criminal Procedure, which provides in part:

(b) No search warrant shall issue for any purpose in this state unless sufficient facts are first presented to satisfy the issuing magistrate that probable cause does in fact exist for its issuance. A sworn affidavit setting forth substantial facts establishing probable cause shall be filed in every instance in which a search warrant is requested. The affidavit is public information if executed, and the magistrate's clerk shall make a copy of the affidavit available for public inspection in the clerk's office during normal business hours.

Crim. Proc. Code art. 18.01(b). Thus, in the instance of a search warrant that was executed, the department must release the supporting search warrant affidavit under article 18.01(b). Therefore, to the extent that the search warrant affidavits that we have marked were submitted in support of search warrants that were executed, the affidavits must be released in accordance with article 18.01(b) of the Code of Criminal Procedure.

Section 552.101 of the Government Code excepts from required public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This exception encompasses the common-law right to privacy. Information must be withheld from the public under section 552.101 in conjunction with common-law privacy when the information is (1) highly intimate or embarrassing, such that its release would be highly objectionable to a person of ordinary sensibilities, *and* (2) of no legitimate public interest. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976).

When a law enforcement agency is asked to compile criminal history information with regard to a particular individual, the compiled information takes on a character that implicates the individual's right to privacy in a manner that the same information in an uncompiled state does not. See *U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989); Open Records Decision No. 616 at 2-3 (1993). In this instance, the request is for "any/all records" regarding a named individual. This request for unspecified information implicates the named individual's privacy interests. Therefore, to the extent that the department maintains any other information encompassed by the Act that relates to the named individual as a criminal suspect, arrestee, or defendant, any such information must be withheld from the requestor under section 552.101 in conjunction with common-law privacy under *Reporters Committee*.

In summary: (1) information held by the department as an agent of the grand jury is in the grand jury's constructive possession and is not subject to disclosure under the Act; (2) the arrest warrant must be released under article 15.26 of the Code of Criminal Procedure; (3) to the extent that they were submitted in support of search warrants that were executed, the search warrant affidavits must be released under article 18.01(b) of the Code of Criminal Procedure; and (4) to the extent that the department maintains any other information encompassed by the Act that relates to the named individual as a criminal suspect, arrestee, or defendant, any such information must be withheld from the requestor under section 552.101 of the Government Code in conjunction with common-law privacy under *Reporters Committee*. As we are able to make these determinations, we need not address sections 552.103, 552.108, or 552.130.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the

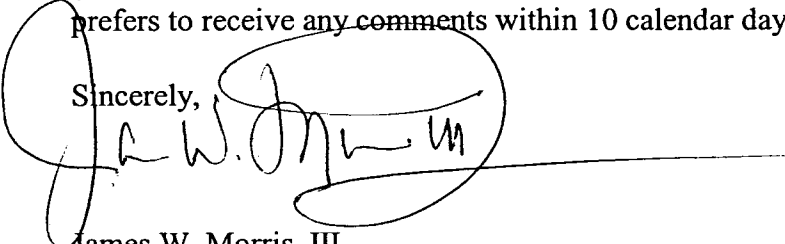
governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/sdk

Ref: ID# 204776

Enc: Submitted documents

c: Mr. Stanley G. Schneider
Schneider & McKinney, P.C.
2110 Lyric Centre
440 Louisiana
Houston, Texas 77002
(w/o enclosures)